the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

In response to our petition for certiorari, the landowners argue (Br. in Opp. 2) that Congress, by enacting Section 111 of the River and Harbor Act of [illegible], 84 Stat. 1821, 33 U.S.C. 595a, has legislatively "set aside" *United States* v. *Rands*, 389 U.S. 121, and its predecessors. Stated simply, Section 595a provides that where (1) land is taken in its entirety, (2) for public use in connection with the improvement of rivers, harbors, canals, or waterways, (3) the land is to be valued at its best use even if dependent upon access to the navigable waters in question. *Rands*, however, dealt not with what Congress might agree to pay as compensation, but rather with "whether the compensation which the United States is constitu-

453-878—72——1

tionally required to pay when it condemns riparian land includes the land's value as a port site" (389 U.S. at 121). As a statement of the duty of the United States, *absent a statute creating a greater duty, Rands* is still valid law. Moreover, 33 U.S.C. 595a refers only to takings for improvement of navigable rivers and waterways while *Rands*, which relied in part upon *United States* v. *Twin City Power Co.*, 350 U.S. 222, dealt with riparian takings for hydroelectric projects or any other purpose.

In the present case the taking was admittedly not under conditions governed by 33 U.S.C. 595a, nor is there any other statute under which Congress has agreed to pay more than required by the Constitution. In fact, 43 U.S.C. 315q, which provides for compensation set by the head of the Department utilizing the land when grazing permits are canceled for "war or national defense purposes," shows a congressional intent not to allow compensation for such rights where not taken for such purposes, *Osborne* v. *United States*, 145 F. 2d 892, 896 (C.A. 9) (see Pet. p. 6, n. 4), as does the directive of Section 315b that the issuance of a grazing "permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands."

Congress should not by implication be held to have made gifts from the public treasury. And even when Congress has conferred a gratuity, a "further burden * * * should not be added to the gift without the use of the very plainest language." *District of Columbia*

v. *Johnson*, 165 U.S. 330, 339. See, also, *Pine Hill Co.* v. *United States*, 259 U.S. 191, 196.

For the foregoing reasons, and for those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972